Supreme Court U.S.
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NO. 98-

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

EARL ANTHONY WEBB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

BRIAN WOLFMAN
(Counsel of Record)
AMANDA FROST
ALAN B. MORRISON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Attorneys for Petitioner

February 10, 1999

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QUESTION PRESENTED

Did the court of appeals err in dismissing a federal criminal defendant's appeal because the notice of appeal did not explicitly "name the court to which the appeal is taken" under Federal Rule of Appellate Procedure 3(c), where the notice of appeal put the government and the court on notice that an appeal had been taken to the Sixth Circuit, the only court in which an appeal was proper?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit dismissing petitioner's appeal is reported at 157 F.3d 451 (6th Cir. 1998), and is reproduced in the appendix at Pet. App. 1a. The judgment of the United States District Court for the Eastern District of Michigan, sentencing petitioner to 30 years in prison, is reproduced in the appendix at Pet. App. 7a.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1998. On December 23, 1998, Justice Stevens granted petitioner's application for an extension of time to file this petition for a writ of certiorari up to and including February 19, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Appellate Procedure 3(c) provides in relevant part:

> A notice of appeal ... must name the court to which the appeal is taken.[1]

STATEMENT OF THE CASE

Petitioner Earl Anthony Webb seeks a writ of certiorari to challenge the Sixth Circuit's ruling that it did not have

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[1] The Federal Rules of Appellate Procedure were recodified effective December 1, 1998. The relevant language of Rule 3(c) is now codified verbatim in Fed. R. App. P. 3(c)(1)(C).

jurisdiction to hear an appeal from his criminal conviction and 30-year sentence, because his notice of appeal, which was timely filed in the district court by petitioner's court-appointed attorney, did not explicitly name the court of appeals to which the appeal was taken. Because this ruling is at odds with decisions of other courts of appeals on precisely the same issue, and with the decisions of this Court in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), and *Foman v. Davis*, 371 U.S. 178 (1962), the Court should grant review. The Sixth Circuit's decision is so plainly incorrect that summary reversal may be appropriate.

1. In February 1995, the government filed a one-count indictment in the United States District Court for the Eastern District of Michigan charging petitioner and six other people with conspiracy to distribute cocaine under 21 U.S.C. §§ 846 and 841(a)(1). Pet. App. 2a. On the day after the jury was impaneled, and after being told that two defendants would plead guilty and testify against the others, petitioner pleaded guilty. Pet. App. 2a. However, the next day, petitioner wrote the district court on behalf of himself and two of his co-defendants, explaining that they had been "pressured into pleading guilty, and we have a credible witness to prove it." Sixth Circuit Joint Appendix 35. They therefore sought to withdraw their guilty pleas and proceed to trial. *Id.* at 35-36. After a hearing, the district court denied the request to withdraw the guilty pleas. Immediately thereafter, petitioner again wrote to the district court explaining at length why he should be allowed to go to trial. *Id.* at 37-44. The court construed this letter as a request for reconsideration and denied it. *Id.* at 19-20. Thereafter, the district court entered a judgment of conviction and sentenced petitioner to 30 years in prison. Pet. App. 2a.

Petitioner filed a timely notice of appeal, the body of

which stated: "Comes now Defendant EARL A. WEBB and gives notice of the appeal of his final conviction and sentence entered of record on January 9, 1997." Pet. App. 9a (reproducing notice of appeal). The notice of appeal contained the style of the case showing that the conviction had been entered in the United States District Court for the Eastern District of Michigan. The district court case number contained the abbreviation "CR," indicating that petitioner's case was a criminal matter. *See id.* On the same day that the notice of appeal was entered on the district court docket, the district court clerk transmitted the record to the United States Court of Appeals for the Sixth Circuit, the only court having appellate jurisdiction over criminal appeals from the Eastern District of Michigan. Sixth Circuit Joint Appendix 9 (district court docket entries 160 and 161); *see* 28 U.S.C. §§ 41, 1291, 1294(1). Thereafter, petitioner's attorney and the United States Attorney for the Eastern District of Michigan filed briefs in the Sixth Circuit on the merits of the appeal, neither of which questioned the court of appeals' jurisdiction. Indeed, the government's Sixth Circuit brief specifically noted that petitioner's notice of appeal was timely filed. *See* Final Brief for the United States in *United States v. Webb*, No. 97-1116, at 4 (6th Cir. Oct. 14, 1997).

2. Without briefing or oral argument on the issue, the Sixth Circuit dismissed the appeal *per curiam*, holding that it lacked jurisdiction under Federal Rule of Appellate Procedure 3(c), which states that a notice of appeal "must name the court to which the appeal is taken." The court of appeals relied on this Court's decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). *Torres* held that the use of "*et al.*" in a notice of appeal, rather than referring to the specific appellant, did not meet Rule 3(c)'s requirement that a notice of appeal "specify the party or parties taking the appeal," where the aggrieved party

was one of 16 potential appellants. *Id.* at 289. The Sixth Circuit acknowledged *Torres*' statement that the requirements of Rule 3 should be liberally construed, and that a notice of appeal which contains the "functional equivalent" of the Rule's requirements suffices to establish jurisdiction. Pet. App. 4a; *see Torres*, 487 U.S. at 316-17. However, the court did not explore, or even mention, whether the notice of appeal here met the functional equivalence test, even though petitioner's notice of appeal included the proper Eastern District of Michigan case style, and was filed in a criminal case for which the Sixth Circuit was the only court in which an appeal would lie. *See* 28 U.S.C. §§ 41, 1291, 1294(1).

The Sixth Circuit also relied on its earlier decision in *Brooks v. Toyotomi Co., Ltd.*, 86 F.3d 582 (6th Cir. 1996), in which a civil appellant had not designated the judgment or order appealed from, and had not explicitly named the court to which the appeal was taken. The court of appeals noted *Brooks*' reliance on *Torres*, to the effect that the requirements of Rule 3(c) are jurisdictional and that the "failure to clear a jurisdictional hurdle can never be harmless." Pet. App. 5a (quoting *Brooks*, 86 F.3d at 586). *Brooks* did not reach the jurisdiction question, however, and, in a passage not mentioned in the decision below, indicated that, if it had been required to do so, it likely would have found jurisdiction under *Torres*. *See Brooks*, 86 F.3d at 585-86. Nevertheless, the court of appeals then held that, despite a lack of prejudice to the government, it did not have jurisdiction over petitioner's appeal. Pet App. 6a.[2]

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[2] In the brief period since the decision in this case, the Sixth Circuit has twice relied on that decision to dismiss appeals without reaching the merits. *See United States v. Olds*, 1998

(continued...)

REASONS FOR GRANTING THE WRIT

A. THE SIXTH CIRCUIT'S RULING CREATES A CONFLICT IN THE CIRCUITS ON AN IMPORTANT ISSUE OF FEDERAL LAW.

As described above, relying on this Court's decision in *Torres v. Oakland Scavenger Co.*, the Sixth Circuit dismissed petitioner's appeal because his notice of appeal did not expressly name the Sixth Circuit, notwithstanding the fact that the Sixth Circuit was the only court in which an appeal was proper. This holding is in conflict with post-*Torres* rulings of other circuit courts on the exact same issue.

In *Ortiz v. John O. Butler Co.*, 94 F.3d 1121 (7th Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997), the Seventh Circuit looked to this Court's statement that "a notice of appeal [is] sufficient so long as it 'is the functional equivalent of what the rule requires.'" *Id.* at 1125 (quoting *Torres*, 487 U.S. at 316-17). It further noted that an appellant's failure to designate the court to which he is appealing "is not fatal where the intention

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(...continued)
U.S App. Lexis 30120 (6th Cir. Nov. 20, 1998) (refusing to reach merits of sentencing guidelines appeal for failure to name Sixth Circuit in notice of appeal; case previously remanded by this Court in light of *Bailey v. United States*, 516 U.S. 137 (1995)); *Dillon v. United States*, No. 97-3138 (6th Cir. Nov. 10, 1998) (dismissing post-conviction petition under 28 U.S.C. § 2255 for failure to name court of appeals). The Sixth Circuit has recently vacated its decision in *Dillon* and agreed to hear that case en banc. *Dillon v. United States*, No. 97-3138 (6th Cir. Jan. 21, 1999) (order granting rehearing en banc).

to appeal to a certain court may be inferred from the notice and the defect has not misled the appellee." *Id.* Thus, the court concluded, it had jurisdiction because the Seventh Circuit was "the only court to which Ortiz could have appealed." *Id.*; *see also Bradley v. Work*, 154 F.3d 704, 707 (7th Cir. 1998) (reaffirming *Ortiz*).

The Fifth Circuit addressed the same issue in *McLemore v. Landry*, 898 F.2d 996, 999 (5th Cir. 1990). In that case, the notice of appeal was filed by both a partnership and "the respective individual partners therein" from a decision of the District Court of the Middle District of Louisiana, but the notice did not name the court to which the appeal was taken. The court held that, in light of the liberal construction rule endorsed by this Court in *Foman v. Davis*, 371 U.S. 178, 181-82 (1962), and reaffirmed in *Torres*, it had jurisdiction because the Fifth Circuit was "the only court to which an appeal may be had." *McLemore*, 898 F.2d at 999. By contrast, *McLemore* held that the notice of appeal conferred jurisdiction only over the appeal of the partnership, not the appeal of the individual partners, because the latter were not named and there was confusion as to which of the partners actually sought to appeal. *Id.* at 1000 & n.6.

Even more at odds with the Sixth Circuit's decision below are two circuit court decisions in which the notice of appeal named the *wrong* court, but the court of appeals nevertheless exercised jurisdiction because the notice contained the functional equivalent of what Rule 3(c) requires. In *United States v. Musa*, 946 F.2d 1297 (7th Cir. 1991), the appellant mistakenly designated the Eighth Circuit, rather than the Seventh Circuit, as the court to which the appeal was taken. The court noted that the "[c]entral" principal of *Torres*—"fair notice to the opposition and the court"—was not violated

because the notice was properly filed with the clerk of the District Court for the Southern District of Illinois and it unambiguously notified the appellee of the order being appealed. *Id.* at 1301. Because of those facts, and because the Seventh Circuit was the only court in which an appeal was proper, that court assumed jurisdiction. Similarly, in *Anderson v. District of Columbia*, 72 F.3d 166, 168 (D.C. Cir. 1995), the court relied on what it called the "fair notice" principle of *Torres* and *Musa* to conclude that it had jurisdiction, even though the defendant's notice of appeal mistakenly named this Court. The D.C. Circuit noted that "[t]his court, of course, is the only one to which Anderson may appeal." *Id.*[3]

The government may contend that review is unwarranted because of the court of appeals' aside that, before noticing the purported jurisdictional defect, it was prepared to rule against petitioner on the merits. Pet. App. 3a. But that is of no solace to petitioner, who is now barred from challenging his conviction either in the Sixth Circuit or in this Court. Moreover, the Sixth Circuit's hint at the outcome on the merits only compounds that court's mistake on the Rule 3(c) question. In short, having decided the case on jurisdictional grounds, the

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[3] Pre-*Torres* decisions of other courts of appeals also conflict with the decision of the Sixth Circuit below. *See, e.g., Graves v. General Ins. Corp.*, 381 F.2d 517, 519 (10th Cir. 1967) (notice of appeal naming Supreme Court of New Mexico did not deprive Tenth Circuit of jurisdiction where that court was "the only court to which an appeal could be taken"); *Cutting v. Bullerdick*, 178 F.2d 774, 776-77 (9th Cir. 1949) (notice of appeal that did not name any court sufficient to place jurisdiction in Ninth Circuit where it was obvious that no other court had jurisdiction).

court of appeals went beyond its proper role by issuing an advisory opinion on petitioner's claim to withdraw his guilty plea. *See Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1012 (1998).

The Sixth Circuit's decision is also worthy of review because of the impact that the decision has had, and may continue to have, on the substantive rights of persons who are appellants in the Sixth Circuit. Petitioner has been sentenced to 30 years in prison without a ruling on the merits of his appeal, and, as noted earlier, others have already fallen victim to the Sixth Circuit's rule. *See supra* note 2.

In sum, the conflict created by the Sixth Circuit's ruling warrants this Court's review.

B. THE SIXTH CIRCUIT'S DECISION IS AT ODDS WITH THIS COURT'S PRECEDENTS.

The decision below is incompatible with this Court's decisions in *Torres* and *Foman*. As noted earlier, *Torres* involved an appeal brought by 16 intervenors in an employment discrimination class action. The notice of appeal named 15 of the 16 intervenors, *see Torres*, 487 U.S. at 323 (Brennan, J., dissenting), but not Mr. Torres, whose name was left off the notice of appeal because of a clerical error. *Id.* at 313 (majority opinion). The Court held that Torres had not appealed because, as to Torres, the notice of appeal did not "specify the party or parties taking the appeal." *Torres*, 487 U.S. at 314 (quoting Fed. R. App. P. 3(c)). The Court went on to explain that "[t]he purpose of the specificity requirement of Rule 3(c) is to provide notice both to the opposition and to the court of the identity of the appellant or appellants." *Id.* at 318. Thus, the notice of appeal's inclusion of the phrase "'et al.,' which literally means

'and others'," *id.*, did not suffice to establish jurisdiction because "it utterly fail[ed] to provide such notice to either intended recipient." *Id.*

Torres expressly reaffirmed *Foman v. Davis*, 371 U.S. 178, which held that the Rules of Appellate Procedure "should be liberally construed," so that "if a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires." *Torres*, 487 U.S. at 316-17. *Foman* concerned Rule 3(c)'s requirement that a notice of appeal "designate the judgment, order or part thereof appealed from." *See Torres*, 487 U.S. at 316 (quoting Rule). In *Foman*, the complaint was dismissed, and the plaintiff thereafter filed motions to vacate the dismissal and to amend the complaint. While those motions were pending, the plaintiff filed a notice of appeal from the underlying dismissal (which was premature in light of the pending motions). Later, when the motions to vacate and amend were denied, the plaintiff filed a second notice of appeal from that denial, but the notice did not mention the underlying dismissal. The court of appeals held that it did not have jurisdiction to hear an appeal from the underlying dismissal because the second notice of appeal did not specify that order. This Court reversed, holding that, in light of the totality of the circumstances, the second notice of appeal should have been treated as "an effective, although inept, attempt to appeal from the judgment sought to be vacated." *Foman*, 371 U.S. at 181.

Taken together, *Torres* and *Foman* demonstrate that the decision below is wrong. If, under *Torres*, the purpose of Rule 3(c) is to give the opponent and the court "fair notice" of the information set forth in the rule, and, under *Foman*, the court of

appeals must look to the totality of the circumstances, then the notice of appeal here surely conferred jurisdiction on the Sixth Circuit. The Sixth Circuit and the government plainly did not lack notice, because the Sixth Circuit processed the appeal, and received briefs and heard argument from both parties directed solely to the merits, until the court of appeals raised the jurisdictional issue *sua sponte*. The routine consideration of petitioner's appeal occurred for a simple reason: The Sixth Circuit is the *only* court in which a criminal appeal from the Eastern District of Michigan may be heard. *See* 28 U.S.C. §§ 41, 1291, 1294(1). Thus, because petitioner's attorney styled the case properly—the notice contained the name of the district court and the criminal-case-number designation—and he filed the notice of appeal in the proper court, the notice of appeal was, under *Torres*, the functional equivalent of what the Rule demands. *Accord Smith v. Barry*, 502 U.S. 244, 248 (1992) (under the functional equivalence test, even appellate brief can serve as notice of appeal).

Moreover, in *Torres*, the concern was that "the court [would be] unable to determine with certitude whether a losing party not named in the notice of appeal should be bound by an adverse judgment or held liable for costs or sanctions." *Torres*, 487 U.S. at 318; *see also Smith*, 502 U.S. at 248 (purpose of Rule 3(c) "is to ensure that the filing provides sufficient notice to other parties and the courts"). No such uncertainty exists here. Petitioner's position is thus consistent with post-*Torres* circuit court decisions holding that a notice of appeal leaving no doubt of a particular person's intention to appeal confers jurisdiction on the court of appeals, even if it does not refer to the appellant by name. *See, e.g., Milanovich v. Costa Crociere, S.p.A.*, 938 F.2d 297, 298 (D.C. Cir. 1991) (appeal of both Gregory Milanovich and his wife preserved by notice of appeal filed on behalf of "plaintiffs," with caption "Gregory

Milanovich *et ux.*," because, by definition, "*ux.*" referred to Milanovich's wife); *Pope v. Mississippi Real Estate Comm'n*, 872 F.2d 127, 129 (5th Cir. 1989) (both James and Mary Pope's appeals preserved by notice of appeal stating "Plaintiffs do hereby appeal" and captioned "James William Pope, *et al.*," because James and Mary Pope were only plaintiffs, and thus there was no doubt to whom "*et al.*" referred).

We recognize that the potential for harsh consequences on substantive rights is not a sufficient reason to refuse to enforce a jurisdictional bar. *See Torres*, 487 U.S. at 318. However, because of that potential for harsh consequences, this Court has also looked to whether there are important countervailing benefits for such a jurisdictional bar, including the promotion of certainty, *id.*, efficiency, or fair notice, *id.*; *Foman*, 371 U.S. at 181; *Smith v. Barry*, 502 U.S. at 248, or to prevent the defaulting party from gaining some unfair advantage. *See Torres*, 487 U.S. at 318 (suggesting that non-named appellant might later claim that adverse appellate judgment was not binding on him). As explained above, no such countervailing benefit exists here, where the court and the parties knew, as soon as they saw the notice of appeal, who was appealing, the order appealed from, *and* the court to which the appeal was taken. In short, this is a case of an obvious clerical mistake, prejudicing no one, in which the omission could not possibly have provided petitioner with a tactical advantage.

Finally, the decision below is difficult to square with the principle underlying 28 U.S.C. § 1631, which permits the transfer of mis-filed civil actions, and mis-noticed appeals (whether civil or criminal), from courts lacking jurisdiction, to those in which jurisdiction is proper. Although section 1631 applies only to an appeal that is noticed in the wrong court, not to a notice of appeal that does not name a court to which an

appeal is taken, it nonetheless underscores the error of the court of appeals here. If, instead of filing the notice of appeal without explicitly naming the Sixth Circuit, petitioner's notice of appeal had named the Seventh Circuit, and the notice had been filed with the Seventh Circuit Clerk in Chicago—a more fundamental error and one more likely to engender delay and confusion—petitioner's appeal could have been sent to the Clerk of the Sixth Circuit, and the case would have proceeded. Review is warranted here because the court of appeals has reached a manifestly unjust result where the notice of appeal indisputably provided notice to petitioner's opponent and to the court and was, under the precedents of this Court, the functional equivalent of the notice required by Rule 3(c).

CONCLUSION

The petition for a writ of certiorari should be granted. The Court should summarily reverse the decision below or set the case for plenary review.

Respectfully submitted,

Brian Wolfman
(Counsel of Record)
Amanda Frost
Alan B. Morrison
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Attorneys for Petitioner

February 10, 1999

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EARL ANTHONY WEBB,
Defendant-Appellant.

No. 97-1116

Appeal from the United States District Court
for the Eastern District of Michigan at Flint.
No. 95-50007--Paul V. Gadola, District Judge.

Argued: August 7, 1998

Decided and Filed: October 1, 1998

Before: MERRITT, KENNEDY, and GILMAN, Circuit Judges.

COUNSEL

ARGUED: Scott A. Keillor, Ypsilanti, Michigan, for Appellant. Robert W. Haviland, Office of the U.S. Attorney, Flint, Michigan, for Appellee. **ON BRIEF:** Scott A. Keillor, Ypsilanti, Michigan, for Appellant. Robert W. Haviland, Office of the U.S. Attorney, Flint, Michigan, for Appellee.

OPINION

PER CURIAM. Earl Anthony Webb appeals from his conviction and sentence for conspiring to distribute cocaine in violation of 21 U.S.C. § 846. In support of the appeal, Webb argues that the district court abused its discretion in refusing to allow him to withdraw his guilty plea, which he had entered shortly after the commencement of trial. For the reasons set forth below, we **DISMISS** the appeal for lack of jurisdiction.

I. BACKGROUND

In February of 1995, the government filed a one-count indictment charging Webb and six other individuals with conspiring to distribute cocaine in violation of 21 U.S.C. § 846. The matter proceeded to trial on October 5, 1995, at which time a jury was empaneled. On the following morning, however, two of the defendants decided to plead guilty and testify against the remaining defendants. In response to this new development, each of the remaining defendants, including Webb, also entered pleas of guilty that morning.

On October 7, 1995, one day after the entry of his guilty plea, Webb wrote the district court a letter on behalf of himself and two of the other defendants. The letter stated that they "were pressured into pleading guilty" and requested that their guilty pleas be withdrawn. The district court subsequently conducted a hearing and found "no adequate reason" to allow the defendants to withdraw their pleas. The district court ultimately sentenced Webb to a 360-month term of imprisonment and entered judgment accordingly.

Webb now appeals from the judgment on the basis that the district court abused its discretion in refusing to allow Webb to

withdraw his guilty plea. After reviewing the briefs and hearing oral argument in the present matter, we were satisfied that the district court's refusal to allow Webb to withdraw his guilty plea did not constitute an abuse of discretion. We were prepared, therefore, to affirm the judgment of the district court on that basis. Since then, however, we have discovered a defect in Webb's Notice of Appeal, which reads as follows:

> Comes now Defendant EARL A. WEBB and gives notice of the appeal of his final conviction and sentence entered of record on January 9, 1997.

Because Webb's Notice of Appeal fails to designate the name of the court to which his appeal is taken, we must dismiss the appeal for lack of jurisdiction.

II. ANALYSIS

Before its amendment in 1993, Rule 3(c) of the Federal Rules of Appellate Procedure provided in relevant part as follows:

> The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order, or part thereof appealed from; and shall name the court to which the appeal is taken. . . . An appeal shall not be dismissed for informality of form or title of the notice of appeal.

Rule 3(c) thus mandated that a notice of appeal: (1) *specify* the party or parties appealing, (2) *designate* the judgment, order, or part thereof that the party or parties are appealing from, and (3) *name* the court to which the party or parties are appealing.

In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988), the Supreme Court construed Rule 3(c) as "a

jurisdictional prerequisite[.]" The Court reasoned that the requirements of Rule 3, which prescribe the method for taking an appeal, and those of Rule 4, which limit the time in which an appeal may be taken, combine to form "a single jurisdictional threshold." *Id.* at 315. In so holding, the Court emphasized that "although a court may construe the Rules liberally in determining whether they have been complied with, it may not waive the jurisdictional requirements of Rules 3 and 4, even for 'good cause shown' under Rule 2, if it finds that they have not been met." *Id.* at 317.

The principle espoused in *Torres* was reiterated in *Smith v. Barry*, 502 U.S. 244 (1992). In determining whether an appellate brief may serve as the "functional equivalent" of a notice of appeal, the Supreme Court initially observed that "Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review. Although courts should construe Rule 3 liberally when determining whether it has been complied with, noncompliance is fatal to an appeal." *Id.* at 248 (internal citation omitted).

Rule 3(c) was amended in 1993, and now provides in relevant part as follows:

> A notice of appeal must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal. . . . A notice of appeal also must designate the judgment, order, or part thereof appealed from, and must name the court to which the appeal is taken. An appeal will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

As with its predecessor, Rule 3(c) as amended requires that a notice of appeal: (1) *specify* the party or parties appealing, (2) *designate* the judgment, order, or part thereof that the party or parties are appealing from, and (3) *name* the court to which the party or parties are appealing. Neither the language of the amended rule nor the advisory committee note thereto suggests that its requirements are no longer jurisdictional in nature.

In *Brooks v. Toyotomi Co., Ltd.*, 86 F.3d 582, 586 (6th Cir. 1996), a decision rendered three years after the 1993 amendment to Rule 3(c), this court addressed a notice of appeal that failed to either designate the judgment or order appealed from, or name the court to which the appeal was taken. *Brooks* expressly acknowledged the vitality of the principle espoused in *Torres* and *Smith*:

> It is now well established that the requirements of Rule 3 are jurisdictional--and, as the *Torres* Court noted, a litigant's failure to clear a jurisdictional hurdle can never be harmless[.] Notwithstanding the absence of prejudice, we take it, a defective notice of appeal can never confer jurisdiction on an appellate court unless the filing is timely under Rule 4 and conveys the information required by Rule 3(c).

Brooks, 86 F.3d at 586 (internal citations and quotations omitted). The *Brooks* court nevertheless considered the merits of the case, stating that "we shall simply assume the existence of appellate jurisdiction *arguendo*, without holding that jurisdiction exists. The end result will be identical to that of a dismissal for want of jurisdiction." *Id.* at 587. The Supreme Court, however, has recently rejected such an approach. *See Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1012 (1998) (declining to endorse the practice of "assuming" jurisdiction for

the purpose of deciding the merits of a case "because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers.").

In light of Rule 3(c)'s clear mandate that a notice of appeal must name the court to which the appeal is taken, coupled with the well-established principle that the requirements of Rule 3(c) are jurisdictional in nature, we conclude that we lack jurisdiction over Webb's appeal. Although timely filed under Rule 4(b), Webb's Notice of Appeal neglects to name the court to which his appeal is taken as required under Rule 3(c). Under these circumstances, Webb's Notice of Appeal failed to confer jurisdiction upon this court, notwithstanding any absence of prejudice to the government. *See Brooks*, 86 F.3d at 586.

III. CONCLUSION

For the reasons previously set forth, we **DISMISS** Webb's appeal for lack of jurisdiction.

UNITED STATES DISTRICT COURT
Eastern District of Michigan

UNITED STATES OF AMERICA

v.

EARL A. WEBB

Defendant.

Case Number CR 95-CR-50007-07-FL
Honorable Paul V. Gadola

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1997)

The defendant, **EARL A. WEBB**, was represented by **Scott Keillor**.

The defendant pleaded guilty to Count One. Accordingly, the defendant is adjudged guilty of such count, involving the following offense:

Title & Section	Nature of Offense
21 U.S.C. 846	**Conspiracy to Distribute Cocaine**

Date Offense Concluded	Count Number(s)
02/17/95	**One**

As pronounced on **January 9, 1997**, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $50.00, for Count One, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Signed: January 9th, 1997
s/
Paul V. Gadola
United States District Judge

Defendant's SSN: **370-70-5761**
Defendant's Date of Birth: **12/13/72**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **360** months.

The Court waives assessment of a fine or costs of incarceration and supervision due to the defendant's lack of ability to pay.

The defendant is remanded to the custody of the United States Marshal.

[Remainder of standard form omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - FLINT

UNITED STATES OF AMERICA,

Plaintiffs,

-vs-

EARL A. WEBB,

Defendant.

Case No. 95-CR-50007-FL-07
(Honorable Paul V. Gadola, Judge)

NOTICE OF APPEAL

Comes now Defendant EARL A. WEBB and gives notice of the appeal of his final conviction and sentence entered of record on January 9, 1997.

DATED: 1-21-97

Respectfully submitted,
s/_____
SCOTT A. KEILLOR (P-38880)
Attorney for Defendant
2160 Washtenaw
Ypsilanti, MI 48197
313/487-5537

CERTIFICATE OF SERVICE

I hereby certify that on 1-22-97 a copy of the foregoing Notice has been delivered to the office of the United States Attorney for the Eastern District of Michigan, Room 210 Federal Courthouse Bldg., 600 Church Street, Flint, Michigan 48502, by first class mail.

s/_____
SCOTT A. KEILLOR
(P-38880)

Supreme Court, U.S.
FILED
APR 12 1999
CLERK

(2)

No. 98-1280

In the Supreme Court of the United States

OCTOBER TERM, 1998

EARL ANTHONY WEBB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

8 pp

QUESTION PRESENTED

Federal Rule of Appellate Procedure 3(c)(1) provides that a "notice of appeal must," among other things, "name the court to which the appeal is taken." The question presented is:

Whether the court of appeals erred in dismissing petitioner's appeal because of his failure to designate in his notice of appeal the court to which he was appealing, where other information in the notice adequately identified the appellate court.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 157 F.3d 451.

JURISDICTION

The court of appeals entered its judgment on October 1, 1998. On December 23, 1998, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including February 19, 1999, and the petition was filed on February 10, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a guilty plea in the United States District Court for the Eastern District of Michigan,

petitioner was convicted of one count of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846. He was sentenced to 360 months' imprisonment. Pet. App. 2a, 8a.

1. In February 1995, petitioner and six co-defendants were indicted for conspiring to distribute cocaine. After a jury was impaneled, two of petitioner's co-defendants decided to plead guilty. In light of that development, petitioner and the remaining co-defendants also pleaded guilty. Pet. App. 2a. The following day, petitioner wrote a letter to the district court, on behalf of himself and two co-defendants, stating that their pleas were entered as a result of pressure and asking to withdraw them. After a hearing, the district court found no adequate reason to allow petitioner to withdraw his plea and accordingly denied petitioner's motion. *Ibid.*

Petitioner filed a timely notice of appeal in the district court that had entered the conviction, in which he "[gave] notice of the appeal of his final conviction and sentence entered of record on January 9, 1997." Pet. App. 3a, 9a. Petitioner's notice of appeal did not name the court to which the appeal was taken. *Ibid.* It did, however, identify the district court from which the appeal was taken and the presiding judge, and it also provided the criminal-case docket number. *Id.* at 9a.

2. The court of appeals dismissed petitioner's appeal for lack of jurisdiction. Pet. App. 1a-6a. The court initially noted that "the district court's refusal to allow [petitioner] to withdraw his guilty plea did not constitute an abuse of discretion" and that the court of appeals had been "prepared * * * to affirm the judgment of the district court on that basis." *Id.* at 3a. The court held, however, that it lacked jurisdiction over petitioner's appeal. The court noted that Rule 3(c) of

the Federal Rules of Appellate Procedure "requires that a notice of appeal * * * name the court to which the party or parties are appealing," Pet. App. 5a (emphasis omitted), and that the Rule's requirements were "jurisdictional in nature," *id.* at 4a (quoting *Smith* v. *Barry*, 502 U.S. 244, 248 (1992)). Because petitioner's notice of appeal "neglect[ed] to name the court to which his appeal [was] taken as required under Rule 3(c)," the court concluded that the notice "failed to confer jurisdiction upon this court, notwithstanding any absence of prejudice to the government." *Id.* at 6a.

3. On January 21, 1999, the Sixth Circuit granted rehearing en banc in *Dillon* v. *United States*, No. 97-3138, to reconsider whether a prospective appellant's failure to identify the appropriate court of appeals by name in his notice of appeal automatically deprives the appellate court of jurisdiction.

DISCUSSION

1. We agree with petitioner (Pet. 5-12) that the court of appeals erred in ruling that it lacked jurisdiction over his appeal. Where, as here, the notice of appeal contains on its face other information from which the proper appellate tribunal can be discerned, such as the name of the district court from which the judgment originates and sufficient identifying information about the subject matter to foreclose jurisdiction in any non-regional court of appeals, the technical deviation from Federal Rule of Appellate Procedure 3(c)'s terms does not deprive the court of appeals of jurisdiction.

Rule 3(c)(1) directs that a notice of appeal must contain three elements to be effective: (1) it "must * * * specify the party or parties taking the appeal;" (2) it "must * * * designate the judgment, order, or part thereof being appealed;" and (3) it "must * * *

name the court to which the appeal is taken." This Court has held that "Rule 3(c)'s dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review. * * * [N]oncompliance is fatal to an appeal." *Smith* v. *Barry*, 502 U.S. 244, 248 (1992).

Rule 3(c)(4) further provides, however, that "[a]n appeal must not be dismissed for informality of form or title." This Court, moreover, has held that, even if a notice of appeal is "technically at variance with the letter of a procedural rule," the court of appeals will have jurisdiction if "the litigant's action is the functional equivalent of what the rule requires." *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 316-317 (1988); see also *Smith* v. *Barry*, 502 U.S. at 248 ("[C]ourts should construe Rule 3 liberally when determining whether it has been complied with.").

The court of appeals accordingly erred in treating the notice of appeal's failure to identify the Sixth Circuit by name as dispositive of the jurisdictional inquiry. Instead, the court should have gone on to inquire whether the content of the notice of appeal otherwise reasonably conveyed the same information and thus performed the "functional equivalent" of naming the appellate tribunal.

Petitioner's notice of appeal did that. The notice identified the judgment subject to appeal as originating from the United States District Court for the Eastern District of Michigan and as involving review of his "final conviction and sentence." Pet. App. 9a. The docket number's use of "CR" further confirmed that the appeal was from a judgment in a criminal case. See *ibid.* By law, an appeal from the Eastern District of Michigan in a criminal case could proceed to only one court of appeals—the Sixth Circuit. 28 U.S.C. 41, 1291,

1294(1). Petitioner therefore provided fair notice that his appeal was being taken to the Sixth Circuit. See *Smith* v. *Barry*, 502 U.S. at 248 ("[T]he notice afforded by a document * * * determines the document's sufficiency as a notice of appeal.").[1]

2. We disagree, however, with petitioner's contention (Pet. 5-12) that plenary review or summary resolution of the issue is appropriate at this time. As previously noted (see also Pet. 5 n.2), the Sixth Circuit has granted rehearing en banc in another case, *Dillon* v. *United States*, No. 97-3138 (Jan. 21, 1999), to reconsider the very issue raised by the petition. By letter dated February 24, 1999, the United States advised the Sixth Circuit that it did not agree with the panel's jurisdictional analysis in *Dillon* and thus would oppose the panel's judgment before the en banc court. The Sixth Circuit has ordered simultaneous briefs to be filed by April 26, 1999, and has scheduled oral argument for June 9, 1999.

Petitioner's claim of a circuit conflict and departure from this Court's precedents (Pet. 5-12) is thus premature. If the en banc Sixth Circuit agrees with the

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[1] Petitioner correctly recognizes (Pet. 5-7) that the court of appeals' decision in this case is inconsistent with decisions of the District of Columbia, Fifth, and Seventh Circuits. See *Bradley* v. *Work*, 154 F.3d 704, 707 (7th Cir. 1998) ("This court has held that it will not dismiss on mere technicalities, including in the naming of the court to which a judgment is being appealed, if the notice as a whole is not misleading."); *Anderson* v. *District of Columbia*, 72 F.3d 166, 168 (D.C. Cir. 1995) (per curiam) ("[A]lthough Anderson named the wrong appellate court in his notice of appeal, because it was obvious in which court his appeal properly lay, Anderson gave fair notice to the opposing party and the court."); *McLemore* v. *Landry*, 898 F.2d 996, 999 (5th Cir.) ("River Villa's intent to appeal to this court is made manifest by the fact that this is the only court to which an appeal may be had."), cert. denied, 498 U.S. 966 (1990).

United States and petitioner here and holds that Rule 3(c) is satisfied by notices of appeal that contain information that is functionally equivalent to identifying the appellate court by name, there will be no circuit conflict or deviation from this Court's decisions for this Court to address. Petitioner, however, should be put in a position to have any such rule applied to him. Thus, while plenary review is not currently warranted, it is appropriate to give the Sixth Circuit the opportunity to reconsider its jurisdictional ruling in this case in light of the position ultimately adopted by the en banc court in *Dillon*.[2] Accordingly, the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for disposition in light of the en banc court's eventual decision in *Dillon* v. *United States*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment should be vacated, and the case should be remanded to the court of appeals for disposition in light of the en banc Sixth Circuit's eventual decision in *Dillon* v. *United States*, No. 97-3138.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JAMES K. ROBINSON
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

APRIL 1999

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[2] The government will advise this Court of any decision by the en banc Sixth Circuit in *Dillon* if such a decision is issued before this Court's disposition of the instant petition.